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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

**Seventh report from the Commission to the European Parliament, the Council, the
European Economic and Social Committee and the Committee of the Regions on the
application of Directive 89/552/EEC "Television without Frontiers"**

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1. INTRODUCTION

1.1. Background to this Report

In accordance with Article 26 of Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities¹, as amended by Directive 97/36/EC² (the "Television without Frontiers Directive", referred to below as 'TWFD'), the Commission is submitting the seventh application report to the European Parliament, the Council and the European Economic and Social Committee. The report deals with the application of the TWFD during the period 2007-2008.

The main objective of this report is to describe and analyse the salient facts relating to the application of the TWFD during the reference period³.

On 11 December 2007, the Council and Parliament adopted Directive 2007/65/EC, to be transposed not later than 19 December 2009. This Directive, which entered into force on 19 December 2007, substantially amended the TWFD and re-named it "Audiovisual Media Services Directive"(AVMSD)⁴. The new provisions of the Directive will also be referred to.

1.2. Recent technological developments and development of the television market in Europe

Pay-TV operators have generally reaped significant rewards for their activity while traditional free-to-air and public service broadcasters have suffered from stagnating or declining revenues. From a statistical perspective, the most recent data from 2006⁵ show net revenues of EU broadcasting companies at almost €79 billion (public service 39%, free-to-air commercial 28%, pay-TV 22%, thematic and teleshopping 11%).

By November 2008, more than 4 000 broadcast services were established in the Member States⁶. In addition to 352 analogue and digital terrestrial national channels, some 1 742 channels were available over one or more platforms and at least 650 channels targeted the market of a Member State other than the country of establishment or countries outside the Union. In addition to the channels available nationally or originated in other Member States, it is estimated that more than 1 500 regional channels are available. Moreover, the European public can access more than

¹ OJ L 298, 17.10.1989, p. 23.

² OJ L 202, 30.7.1997, p. 60.

³ It follows the sixth application report (COM(2007) 452 final).

⁴ See article 1 of Directive 2007/65/EC: " Directive 89/552/EEC is hereby amended as follows: 1. the title shall be replaced by the following: "Directive 89/552/EEC of 3 October 1989 of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)".

⁵ European Audiovisual Observatory, Yearbook 2008

⁶ European Audiovisual Observatory, MAVISE database.

750 channels originating from third countries and delivered in at least one Member State.

By December 2008, more than 600 on-demand services were provided by audiovisual media services providers established in the European Union. Most of the non-linear services are provided via Internet or as IPTV services.

Audiences have further fragmented as viewers have to a certain extent switched to new channels and on-demand services. However, viewers have not substantially modified their overall viewing patterns over the period under review. In certain countries viewing time increased in 2008 compared with 2006 (e.g. UK, Spain, Romania) while in others it declined (e.g. Czech Republic, Germany, Belgium, Netherlands). Hungary remains the country where daily viewing is longest (260 min/day), while Austria and Sweden are the Member States where viewers spend the least time watching TV per day (148 and 160 min/day, respectively).

1.3. New rules introduced by Directive 2007/65/EC

The new AVMSD provides the necessary level of harmonisation of rules to achieve internal market objectives by providing the legal framework for free circulation of audiovisual media services on the basis of the country of origin principle.

2. APPLICATION OF THE DIRECTIVE

2.1. Country of origin, free circulation and jurisdiction (Articles 2, 2a, 3)

The country of origin principle is the cornerstone of Directive 89/552/EEC. Services that comply with the law of the country where their providers are established may circulate freely within the Community internal market. However, Article 2a(2) allows Member States to take safeguard measures where a television broadcast coming from another Member State manifestly, seriously and gravely infringes the Directive's provisions on protection of minors or incitement to hatred.

Pursuant to Article 3, Member States remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by the Directive.

The application of this provision gave rise to a sanction procedure by the Belgian CSA (*Conseil Supérieur de l'Audiovisuel*) against the broadcasters TVi and CLT-UFA for the services RTL-TVi, Club RTL and Plug TV which were under Belgian licence until 31 December 2005 but also had a Luxembourg licence. On 15 January 2009, the Belgian *Conseil d'Etat* ruled that the TWFD clearly states that only one Member State may be competent regarding a broadcaster. It further noted that on 1 January 2006, the channels were licensed by Luxembourg and therefore fall under Luxembourg's jurisdiction. By requiring an authorisation in Belgium, the Belgian authorities had actually denied the validity of the licence issued by Luxembourg.

New rules introduced by Directive 2007/65/EC (new Articles 2(4), 2a(4), 3(2 to 5))

- **Safeguard measures in non-linear services (new Article 2a(4))**

In respect of on-demand audiovisual media services, Article 2a(4) introduces the possibility for a Member State to take safeguard measures regarding the principle of freedom of reception if the measures are necessary to protect public policy, public health, public security and consumers. Except in urgent cases, measures must be preceded by a notification to the competent Member State and to the Commission, and they have to be deemed compatible with Community law by the Commission.

- **Circumvention procedures in linear and non-linear services (new Articles 3 (2 to 5) and 3(8))**

Pursuant to Article 3, Member States remain free to require media services providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by the Directive. Where a Member State considers that a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory, Article 3(2) provides for a cooperation procedure between the competent authorities of the Member States of origin and of destination. In the absence of a satisfactory outcome, when the broadcaster has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, the Member State of destination may take appropriate measures on condition that they are duly notified and are deemed by the Commission to be compatible with Community law.

As regards on-demand services, there is no such provision in cases of circumvention of stricter national rules; however, the general principles developed by the Court of Justice also apply to these services⁷.

- **Subsidiary jurisdiction criteria (new Article 2(4))**

As regards the application of subsidiary criteria for the determination of the competent Member State, the country where the satellite uplink is located has to exercise jurisdiction and only if there is no uplink in the Community, will the Member State with the satellite capacity be responsible.

To avoid cases of double jurisdiction or none at all, a simultaneous entry into force of national measures implementing Article 2(4) at the end of the transposition period was agreed at the 25th meeting of the Contact Committee established pursuant to Article 23 bis of the Directive⁸.

The Commission also proposed cooperation, by exchanging information with regard to satellite operators and uplinks to identify audiovisual media services affected.

⁷ Directive 2000/31/EC Recital (57): The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State. See notably cases C-212/97, Centros, 9 March 1999, and C-196/04, Cadbury, 12 September 2008.

⁸ See 2.7.1

2.2. Events of major importance for society (Article 3a /new Article 3j)

Article 3a(1) TWFD provides that Member States may take measures to ensure that events of major importance for society are not broadcast in a way that deprives a substantial proportion of the public of the possibility of following such events on free television. Under Article 3a(2) of the Directive, the Commission must verify the compatibility of the measures with Community law.

Following the judgment on the Infront WM AG/Commission case⁹, the Commission readopted its decisions on the notified measures in conformity with its rules on collegiate procedure, delegation and enforcement of decisions. The consolidated list of measures was published¹⁰.

Following the Commission's appeal, the Court confirmed the first judgment and decided that Infront had standing to bring the request for annulment before the Court¹¹.

FIFA and UEFA introduced a complaint against the decisions taken by the Commission on the Belgian and UK lists of major events¹², concerning the inclusion of the entire final tournament of the FIFA World Cup and UEFA European Championship in the respective lists of major events.

2.3. Short reporting (new Article 3k)

Directive 2007/65/EC introduced a new provision concerning short extracts to be used in news programmes, whereby any broadcaster established in the European Union has access to short extracts of events of high interest to the public broadcast on an exclusive basis. These short extracts must be used solely for general news programmes.

2.4. Promotion of European and independent works (Articles 4 and 5)

Pursuant to Articles 4 and 5 of the TWFD, broadcasters are obliged to reserve for European works a majority proportion of their qualifying transmission time. Broadcasters must also reserve at least 10% of their broadcasting time or programming budget for European works created by independent producers.

On 22 July 2008, the Commission adopted the eight Communication on the application of Articles 4 and 5 of the TWFD covering the EU-25 over the reference period 2005-2006.

EU-wide average broadcasting time for European works increased from 63.52% in 2005 to 65.05% in 2006. In the medium term (2003-2006), the broadcasting of European works stabilised at above 63%, which demonstrates a satisfactory situation overall for the transmission of European works on EU television channels. The average share of independent producers' works broadcast by all European channels

⁹ Case T-33/01, Infront WM AG /Commission, 15 December 2005.

¹⁰ OJ, C 17 of 24 January 2008, pages 7-10.

¹¹ Case C-125/06, 13 March 2008, Commission/Infront WM AG.

¹² Cases T- 385/07, T-55/08 and T-68/08.

in all Member States rose from 36.44% in 2005 to 37.59% in 2006. This also means that in the medium term (2003-2006), EU-wide broadcasting of European works by independent producers improved by 6.2 percentage points.

New rules introduced by Directive 2007/65/EC (new Articles 1n) (i) third indent and 3i)

For non-linear services, Member States must ensure that on-demand audiovisual media services providers promote, where practicable and by appropriate means the production of and access to European works¹³. Member States must report to the Commission on the application of this provision within two years of the transposition date of the AVMSD and every four years thereafter. A report by the Commission on the application of this provision is also required.

The definition of European works is also extended to audiovisual co-productions realised with third countries with which the Community has concluded agreements relating to the audiovisual sector and under the conditions laid down in each of such agreements.

2.5. Application of the rules on advertising (Articles 10 to 20)

In its ruling regarding the classification of a phone-in programme broadcast by national public Austrian broadcaster ÖRF¹⁴, the Court explained that ‘teleshopping’ or ‘television advertising’ should be assessed at national level but it provided guidelines to assist with the interpretation of both concepts and their application.

Accordingly, for phone-ins to qualify as teleshopping, viewers must be provided with a real offer of services, this being determined by reference to several criteria, such as the length of time devoted to the game, the amount of income generated by premium-rate calls, and the type of question which the candidates are asked.

For phone-ins to qualify as television advertising, adverts inviting viewers to play the game must seek either to encourage viewers to buy the goods and services presented as prizes to be won or to promote the merits of the channel of the broadcaster in question indirectly in the form of self-promotion.

In 2007 and 2008, following the reports delivered to the Commission by an independent consultant, concerning the application of the rules on advertising by the Member States, two infringement procedures were initiated, against Italy and Spain. The infringement procedure against Italy was launched regarding insertion rules and the maximum duration of advertising. Several instances of failure to transpose the rules on advertising within Italian national law were also identified. On 12 December 2007, the Commission sent a letter of formal notice to Italy.

The Italian law was amended in order to guarantee the efficiency of the sanctioning procedure¹⁵ and to respect the insertion rules for advertising.

¹³ Article 3i(1).

¹⁴ C/195-06, Kommunikationsbehörde Austria (KommAustria)/Österreichischer Rundfunk (ORF), 18 October 2007.

¹⁵ <http://www.parlamento.it/leggi/081011.htm#conve>.

The Italian regulator AGCOM also amended the Italian regulation on advertising by two decisions^{16 17}, one on the minimum duration of teleshopping windows and self-promotion and the other including teleshopping spots in the hourly advertising limit¹⁸. It also adopted an interpretative communication on advertising¹⁹.

The report concerning Spain revealed several major and persistent possible breaches of the hourly advertising limit. On 11 July 2007 a letter of formal notice was sent to Spain²⁰ and on 6 May 2008 the Commission issued a reasoned opinion against Spain²¹. On 27 November 2008 the Commission decided to bring the case before the Court of Justice. The Spanish authorities and the Commission differ on the interpretation of the notions of "spot advertisement" and "others forms of advertising", these notions being essential for the implementation of the hourly limit rules. Indeed, Spain's interpretation excludes several types from the hourly limit such as telepromotion spots, micro-ad spots and short reports having the objective of advertising²². Although these types all have, in the Commission's view, the characteristics of advertising spots, they are subject to a separate hourly limit defined in national law.

New rules introduced by Directive 2007/65/EC (new Articles 1(h), 1(m) 3e, 3f, 3g, 10, 11, 18, 18a)

Directive 2007/65/EC introduces the general concept of audiovisual commercial communication and provides for a basic tier of rules on audiovisual commercial communications in all audiovisual media services.

As regards advertising, the daily ceiling on time devoted to advertising is withdrawn but the ceiling of 12 minutes per clock hour is kept. The former 20-minutes rule between each advertising break no longer applies. However, a specific regime of a single advertising break per scheduled period of 30 minutes still applies to cinematographic films, films made for television and news programmes.

Product placement is regulated for the first time. As a matter of principle, product placement is prohibited but may be admissible in some programmes: cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes unless a Member State decides otherwise. Product placement consisting in the provision of goods or services for free such as production props or prizes is allowed in all types of programmes. Where it is allowed, product placement, whether paid or not, must comply with certain rules, such as respect for the responsibility and editorial independence of the media service provider, the absence of encouragement to buy or rent the goods or services concerned, the absence of undue prominence and the obligation to inform viewers of

¹⁶ http://www.agcom.it/provv/d_162_07_CSP.htm.

¹⁷ http://www.agcom.it/provv/d_12_08_CSP.htm.

¹⁸ http://www.agcom.it/provv/d_133_08_CSP.htm.

¹⁹ http://www.agcom.it/provv/d_211_08_CSP/d_211_08_CSP.htm.

²⁰ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1062&format=HTML&aged=0&language=EN&guiLanguage=en>

²¹ <http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/08/700&format=HTML&aged=0&language=EN&guiLanguage=en>

²² In Spanish, *micro-espacios publicitarios* and *publireportages*.

the existence of product placement. In any event, product placement for tobacco products (and from their companies) and for medicinal products or medicinal treatments under prescription is prohibited.

Lastly, Member States are asked to encourage the development of codes of conduct by audiovisual media services providers regarding inappropriate audiovisual commercial communications in children's programmes for sweet, fatty or salty foods or drinks.

2.6. Protection of minors and public order (Articles 2a, 22 and 22a /new Articles 2a, 22 and 3b)

Following three complaints from the Turkish Radio and Television Supreme Council (RTSC), the Danish Radio and Television Board (RTB) ruled in May 2007 that the programmes of the Kurdish broadcaster ROJ TV contained no incitement to hatred.

In June 2008, the German Government banned all activities of ROJ TV in Germany for breaching criminal law through its support of the terror-listed PKK (Kurdistan Workers Party). ROJ TV was also deemed to oppose the promotion of friendship between nations, endanger public security and public order, and violate human dignity.

In November 2008, the German Government banned all activities of Al Manar TV in Germany after having found that "The purpose and activity of Al-Manar TV is to support, advocate and call for the use of violence as a means to achieving political and religious aims". The ban goes beyond the prohibition of broadcasting and retransmission and covers all forms of support for the channel. However, since Al Manar TV does not fall under the jurisdiction of any Member State, the provisions of the TWFD do not apply to this service.

In December 2008, the French CSA (*Conseil Supérieur de l'Audiovisuel*) requested the satellite operator Eutelsat to stop the infringement of the French regulation implementing the TWFD by the Palestinian broadcaster Al-Aqsa TV, as the CSA found incitement to hatred in some of the programmes broadcast.

New rules introduced by Directive 2007/65/EC (new Article 3h)

Directive 2007/65/EC introduces a provision on the protection of minors as regards on-demand services, thereby ensuring that audiovisual media services whose content might seriously impair the physical, mental or moral development of minors are only made available in such a way that normally prevents minors from hearing or seeing such on-demand audiovisual media services²³.

²³

Other actions taken in the field of the protection of minors include a Communication on the protection of minors, in respect of the use of video games adopted by the Commission on 22 April 2008 (COM (2008) /0207 final, 22.04.2008). The Communication addresses several issues including the adoption by the Member States of the PEGI and PEGI On-line rating systems.

2.7. Coordination between national authorities and the Commission

2.7.1. *Contact Committee²⁴ meetings*

Meetings of the Contact Committee took place on 20 November 2007 (25th meeting), 19 February 2008 (26th meeting), 16 April 2008 (27th meeting), 18 June 2008 (28th meeting) and 16 December 2008 (29th meeting). The minutes of these meetings are posted on the Commission's website²⁵.

The Committee followed closely the process of transposing the newly adopted Directive in the Member States. It discussed all the new provisions with regard to possible implementation issues like future transparency requirements and reporting obligations. Delegations also agreed on a procedure to ensure non-disruptive implementation of the changed subsidiary jurisdiction criteria.

2.7.2. *Regulators' meetings*

Meetings with the regulators took place on 30 October 2007 and on 4 July 2008. The main purpose was to have an exchange of views on the new provisions contained in the now re-named AVMSD and to update regulators through discussions held with the Contact Committee. The Commission also attended as observer the European Platform of Regulatory Agencies (EPRA) meetings. Article 23b of the AVMSD reinforces the obligation of cooperation between Member States and between them and the Commission through their respective competent independent regulatory bodies.

3. INTERNATIONAL ASPECTS

3.1. Enlargement – prospects

Croatia, Turkey and the Former Yugoslav Republic of Macedonia are candidate countries for membership of the European Union. After the alignment of Croatian legislation with the TWFD, the Council of the European Union provisionally closed Chapter 10 of the accession negotiations on information society and media on 18 December 2008. The Council decided to open the same chapter in the accession negotiations with Turkey on the same date on the basis of the compromise alignment of Turkish audiovisual legislation with European audiovisual legislation.

As regards the countries of the Stabilisation and Association process (Albania, Bosnia and Herzegovina, Montenegro and Serbia as well as Kosovo under UN Security Council Resolution 1244/99), the Commission is pursuing a strategy for the convergence of their audiovisual policies with European media standards, in cooperation with the Council of Europe. The Commission monitors the process, paying particular attention to the development of administrative and judicial capabilities.

²⁴ Pursuant to Article 23a of the Directive, a contact committee composed of the representatives of the competent authorities is established under the aegis of the Commission. Its tasks are a.o to discuss issues regarding the implementation of the Directive.

²⁵ http://ec.europa.eu/comm/avpolicy/reg/tvwf/contact_comm/index_en.htm.

3.2. International framework for cultural diversity

The Community has been taking steps to implement the UNESCO Convention on the protection and promotion of the diversity of cultural expressions in its policies. By extending the definition of European works to works co-produced in the framework of agreements related to the audiovisual sector concluded between the Community and third countries, the AVMSD increases openness to international cooperation, with the aim of fostering cultural diversity through enhanced opportunities for the circulation of audiovisual works. The Cultural Cooperation Protocol of the Economic Partnership Agreement, signed with 14 Caribbean countries of the CARIFORUM group²⁶ in October 2008, is the first agreement where this approach has been implemented.

3.3. Cooperation with the Council of Europe

On 14 May 2007, the European Commission and the Council of Europe presented a review on the draft digital broadcasting law of Albania.

On 28 April 2008, the European Commission in cooperation with the Council of Europe and OSCE organised an expertise workshop on the independence of media and telecoms regulatory authorities in Sarajevo (Bosnia and Herzegovina).

On 1 and 2 December 2008, the European Commission invited media stakeholders of the Western Balkans countries and Turkey to a seminar in Istanbul on the AVMSD and the digitalisation of television²⁷.

4. NEXT REPORT

Article 26 of the re-named AVMSD stipulates that no later than 19 December 2011, and every three years thereafter, the Commission must submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the field of audiovisual media services, in particular in the light of recent technological developments, the competitiveness of the sector and levels of media literacy in all Member States²⁸. The report should also assess the issue of television advertising accompanying or included in children's programmes, and in particular whether the quantitative and qualitative rules contained in the Directive have afforded the level of protection required. Therefore, the Member States will have to report to the Commission regarding these various issues. Furthermore, the accessibility of audiovisual media services to people with a visual or hearing disability and the co- and self-regulatory regimes should also be referred to.

²⁶ i.e. all the Caribbean states (except Haiti) which are members of CARICOM (Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts & Nevis, Saint Lucia, St. Vincent & The Grenadines, Suriname, Trinidad & Tobago) and the Dominican Republic. The Agreement was signed on 15 October 2008 with 13 of these countries. Guyana signed the Agreement on 20 October 2008.

²⁷ http://ec.europa.eu/avpolicy/ext/enlargement/index_en.htm

²⁸ To this end, a study to develop criteria for assessing media literacy levels has been launched. The contract was signed in October 2008 and the final report is due in July 2009.

5. CONCLUSIONS

This report demonstrates that the Television without Frontiers Directive continues to function as an effective tool to ensure the free circulation of broadcasting services whilst guaranteeing an appropriate level of consumer protection and promotion of European works. The infringement procedures in connection with application of the advertising rules demonstrate the need for close monitoring. However, as stated in the previous report, the legal framework needed to be revised in order to address technological evolution and changes in the market. The adoption of Directive 2007/65/CE, amending substantially the TWFD and modifying its title, responds to these various issues. The adequacy of this new instrument will continue to be monitored and will be addressed by the Commission in coming reports.